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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-816

POTOMAC ELECTRIC POWER COMPANY, PETITIONER

v.

DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR
AND
TERRY M. CROSS, JR.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (App. 5a-40a) is reported at 606 F.2d 1324.[1] The opinion of the Benefits Review Board (App. 41a-44a) is reported at 7 B.R.B.S. 10.

[1] "App." refers to the appendix bound together with petitioner's brief.

The Decision and Order of the administrative law judge (App. 45a–51a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 1979. The petition for a writ of certiorari was filed on November 23, 1979, and was granted on February 19, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an employee under the Longshoremen's and Harbor Workers' Compensation Act who suffers a permanent reduction in wage-earning capacity because of an injury listed in the Act's schedule of benefits may elect to recover compensation for loss of earning capacity rather than the scheduled benefit.

STATUTES INVOLVED

1. Section 2(10) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 902(10), provides:

> When used in this Act—
>
> * * * * *
>
> (10) "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

2. Section 8 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 908, provides in relevant part:

> Compensation for disability shall be paid to the employee as follows:
>
> * * * * *

> (c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66⅔ per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subdivision (b) of subdivision (e) of this section, respectively, and shall be paid to the employee, as follows:
>
> * * * * *
>
> (2) Leg lost, two hundred and eighty-eight weeks' compensation.
>
> * * * * *
>
> (19) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member.
>
> * * * * *
>
> (21) Other cases: In all other cases in this class of disability the compensation shall be 66⅔ per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability * * *
>
> * * * * *

3. Section 1 of the District of Columbia Workmen's Compensation Act, D.C. Code § 36–501 (1973), provides:

> The provisions of chapter 18 of title 33, U.S. Code, including all amendments that may hereafter be made thereto, shall apply in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term "employer" shall be held to mean every person carrying on any employment in the District of Columbia, and the term "employee" shall be held to mean every employee of any such person.

STATEMENT

Respondent Terry M. Cross has been employed by petitioner Potomac Electric Power Company ("PEPCO") continually since 1961. From 1972 until he was injured in 1974 he worked as a Class A cable splicer (App. 46a, 69a). That job was physically demanding and required respondent to work under conditions that were often hazardous.[2] He had to lift heavy equipment, climb ladders, and work in manholes and on scaffolding (App. 46a, 69a–71a). Sometimes he would work with "hot" cables while standing in water (App. 69a). These duties could be performed only by an agile worker in good physical condition because of the climbing and twisting involved in handling cables in confined areas (App. 46a, 69a).

In December 1974, respondent injured his left knee while working in a manhole. He filed a claim for benefits under the District of Columbia Workmen's Compensation Act (D.C. Code § 36–501 (1973)), which makes the provisions of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 901 *et seq.*) applicable to most nongovernmental employment within the District. Petitioner and respondent could not agree on the amount of compensation payable on account of the injury, and the matter was therefore referred to an administrative law judge for a formal hearing (App. 6a–7a).

At the hearing, two doctors testified that, as a result of his knee injury, respondent had suffered a permanent partial loss of the use of his leg, which one doctor estimated at 20% and the other at 5% (App. 46a).[3] The administrative

[2] As used in this brief, "respondent" refers to the individual claimant.

[3] The doctors who testified at the hearing described respondent's physical condition in terms of medical "disability." In general, however, "disability" under the Longshoremen's Act is an economic concept (see page 9, *infra*).

law judge found that, although respondent was still classified as a Class A cable splicer, he could no longer perform all the rigorous work that the job entailed. As a result, respondent had been denied several salary increases and was no longer permitted to work overtime (App. 47a).

The administrative law judge rejected petitioner's contention that the compensation due on account of the injury should be based on the Act's fixed "schedule" award for the loss (including loss of use) of a leg. Section 8(c)(2) and (19), 33 U.S.C. 908(c)(2) and (19). Instead, he applied Section 8(c)(21) of the Act, 33 U.S.C. 908(c)(21), which authorizes compensation in the amount of two-thirds of the difference between a claimant's pre-injury average weekly wages and his post-injury wage-earning capacity. Using respondent's past earnings as a guide, the judge concluded that respondent had suffered a permanent loss in wages of approximately $130 per week as a result of the injury. Accordingly, he awarded respondent two-thirds of that amount, or $86 per week, payable without limitation as to the number of weeks (App. 47a–49a).

Petitioner appealed to the Benefits Review Board pursuant to Section 21(b) of the Act, 33 U.S.C. 921(b), contending that respondent should have been limited to a scheduled award. The Board affirmed the administrative law judge's decision, holding that the scheduled benefits are not exclusive and that where a claimant can prove a loss in wage-earning capacity greater than the compensation provided by the schedule, he may pursue a claim under Section 8(c)(21) (App. 41a–43a).

The court of appeals affirmed the Board's decision by a divided vote (App. 5a–40a).

SUMMARY OF ARGUMENT

The Longshoremen's and Harbor Workers' Compensation Act requires covered employers to provide compensation for disability arising from injuries suffered by their employees in the course of employment. The Act defines disability as a loss of wage-earning capacity resulting from such an injury, and this economic loss concept governs recoveries for total disability, either temporary or permanent, and for temporary partial disability. However, Section 8(c) of the Act, 33 U.S.C. 908(c), which is concerned with permanent partial disability, includes both a schedule of fixed benefits for major physical impairments, such as the loss of an arm or a leg, and a provision (Section 8(c)(21), 33 U.S.C. 908(c)(21)) for calculating compensation in accordance with the Act's basic definition of disability. To collect a scheduled benefit, the worker need prove only that he suffered an injury listed in the schedule; he need not prove loss of wage-earning capacity.

The court of appeals correctly rejected petitioner's contention that only those employees suffering injuries not listed on the schedule may recover for loss of wage-earning capacity under Section 8(c)(21). The court correctly held that an employee who suffers a scheduled impairment that also results in a permanent reduction in his wage-earning capacity may elect to recover compensation for economic loss under Section 8(c)(21) as an alternative to recovering the scheduled benefit. In reaching this conclusion, the court of appeals accorded proper deference to the views of the Benefits Review Board and the Director of the Office of Workers' Compensation Programs, who are charged with administering the Act.

Nothing in the language of the Act precludes the construction upheld by the court of appeals. The Act does not expressly provide that the scheduled benefits are the exclusive remedy for a claimant suffering a listed impairment. To the contrary, Section 8(c)(21) may reasonably be read as applying to *any* employee suffering a permanent reduction of his wage-earning capacity who does not seek a scheduled award, either because the injury he suffered is not listed in the schedule or because he sustained an economic loss from a scheduled impairment that exceeds the amount automatically recoverable under the schedule.

Moreover, although the legislative history of the Act and its amendments contain no statement directly bearing on the issue in this case, that history does indicate that the fundamental purpose of the Act is to compensate covered employees for loss of wage-earning capacity resulting from industrial injuries. The schedule serves that purpose in the case of employees whose loss of wage-earning capacity resulting from a scheduled injury is less than or roughly equivalent to the scheduled benefit, or is difficult to prove. The schedule also ensures that an employee who suffers a major impairment, such as the loss of a limb, will receive some compensation regardless of whether he can prove a loss of wage-earning capacity. But rigid adherence to the schedule in cases, such as this one, where a claimant is willing and able to show a permanent reduction in wage-earning capacity far in excess of the scheduled benefit would frustrate rather than further the fundamental congressional goal.

Petitioner's view also would result in significant anomalies in the Act's operation. First, some employees suffering a substantial economic loss as a result of a scheduled impairment would be grossly undercompensated in comparison with employees who suffer a similar economic loss as a result of a non-scheduled impairment. Second, employees suffering *temporary* partial disability, for which there is no schedule of benefits, might receive a

greater recovery than employees with a *permanent* partial disability resulting from a scheduled impairment. Third, employees suffering permanent total disability, who recover two-thirds of their average pre-injury earnings for as long as that disability exists, would recover a disproportionately greater amount of compensation than employees with high degrees (perhaps as high as 80% or 90%) of permanent partial disability. In the absence of compelling language in the statute, such irrational results should not be attributed to Congress.

Finally, contrary to petitioner's assertion, a construction of Section 8(c)(21) that forces employees suffering scheduled injuries to seek compensation pursuant to the schedule would not necessarily minimize litigation. The reported cases do not suggest that many employees suffering permanent partial disability seek to escape the schedule and prove economic loss. Moreover, denying employees suffering scheduled injuries the right to proceed under Section 8(c)(21) would encourage those who do suffer substantial wage losses to claim that they are totally (rather than partially) disabled or that their scheduled impairments have produced physical effects in other parts of their bodies. Such claims, which petitioner apparently concedes need not be adjudicated under the schedule, might themselves result in additional burdensome litigation.

ARGUMENT

UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, AN EMPLOYEE WHO SUFFERS A PERMANENT REDUCTION IN WAGE-EARNING CAPACITY BECAUSE OF A "SCHEDULED" INJURY MAY ELECT TO RECOVER COMPENSATION FOR LOSS OF WAGE-EARNING CAPACITY RATHER THAN THE SCHEDULED BENEFIT

A. Introduction

The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, requires covered employers to provide compensation for disability arising from injuries suffered in the course of employment.[4] Section 2(10) of the Act defines "disability" in economic terms as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. 902(10). The Act recognizes four types of disability—permanent total, temporary total, permanent partial, and temporary partial—and prescribes rules for determining the amount of compensation due in each instance. With one exception, these rules are calculated to compensate the employee in proportion to his actual economic loss as a result of the injury.[5]

The exception occurs with respect to compensation for permanent partial disability, which is governed by Section 8(c) of the Act, 33 U.S.C. 908(c). That Section includes a schedule of fixed benefits for certain enumerated injuries, providing that the employee be paid the equivalent of two-thirds of his average weekly earnings for a specified number of weeks. 33 U.S.C. 908(c)(1)-(20). The schedule therefore amounts to a flat entitlement to compensation for any listed injury, requiring no proof from the claimant that the injury has in fact caused him disability as defined

[4] The Act is made applicable to most nongovernmental employers within the District of Columbia by D.C. Code § 36-501 (1973).

[5] Under Section 8(a), 33 U.S.C. 908(a), an employee who is permanently totally disabled receives two-thirds of his previous average weekly wages indefinitely. Under Section 8(b), 33 U.S.C. 908(b), an employee who is temporarily totally disabled receives two-thirds of his previous average weekly wages while he remains disabled. Under Section 8(e), 33 U.S.C. 908(e), an employee who is temporarily partially disabled receives two-thirds of the difference between his previous average weekly wages and his wage-earning capacity after the injury, for so long as he remains disabled, but not for more than five years.

by Section 2(10) of the Act. *Travelers Insurance Co.* v. *Cardillo*, 225 F.2d 137 (2d Cir.), cert. denied, 350 U.S. 913 (1955); *Gulf Stevedore Corp.* v. *Hollis*, 298 F. Supp. 426, 431 (S.D. Tex. 1969), aff'd per curiam (opinion adopted), 427 F.2d 160 (5th Cir.), cert. denied, 400 U.S. 831 (1970). Thus, for example, an employee who loses a leg (see Section 8(c)(2), 33 U.S.C. 908(c)(2)) or the use of a leg (see Section 8(c)(18), 33 U.S.C. 908(c)(18)) is entitled to two-thirds of his pre-injury average weekly earnings for 288 weeks even if his earnings are unaffected by the injury.[6]

Section 8(c), however, also contains a provision for calculating awards in proportion to actual economic loss—the sole method used elsewhere in the Act for forms of disability other than permanent partial disability. See note 5, *supra*. Under this "other cases" provision, Section 8(c)(21), 33 U.S.C. 908(c)(21), a claimant is entitled to two-thirds of the difference between his pre-injury average weekly earnings and his earning capacity after the injury. Petitioner, relying principally on what it asserts is the plain meaning of the statute, contends that the permanent partial disability schedule prescribes the exclusive means of calculating awards for the injuries listed therein. As we show below, however, neither the language nor the legislative history of the statute compels this construction, and interpreting the statute in this manner violates this Court's admonition that the Act should be construed liberally so as to avoid "incongruous or harsh results." *Baltimore & Philadelphia Steamboat Co.* v. *Norton*, 284 U.S. 408, 414 (1932). Accord, *Voris* v. *Eikel*, 346 U.S. 328, 333 (1953).

[6]Pursuant to Section 8(c)(19), 33 U.S.C. 908(c)(19), if the loss of use of a body member is less than total, the award is reduced in proportion, *e.g.*, a 50% loss of use of the leg would reduce the scheduled award by half.

In contrast, the view of respondent Director of the Office of Workers' Compensation Programs and of the Benefits Review Board—that an employee who suffers an injury listed in the schedule may, instead of claiming the scheduled award, recover under Section 8(c)(21) if he can establish an actual loss of wage-earning capacity resulting from his injury—is consistent with the purposes of the Act and reduces anomalies in its application. This Court has frequently observed that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong * * *." *E. I. du Pont de Nemours & Co.* v. *Collins*, 432 U.S. 46, 54-55 (1977), quoting *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969). See also *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U.S. 469, 478 (1947). In the present case, where there are strong indications that the administrative construction is correct, the court of appeals was clearly justified in upholding it.

B. Neither the Plain Language Nor the Legislative History of Section 8(c) Precludes An Employee From Electing To Recover Workers' Compensation Based on Actual Loss of Wage-Earning Capacity Rather Than The Benefit Schedule

As with any case involving the interpretation of an Act of Congress, the "analysis must begin with the language of the statute itself." *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 568 (1979). In support of its contention (Br. 5-11) that the "express provisions of the Act" provide that the benefits of Section 8(c)(1)-(19) are, where applicable, the exclusive form of compensation for permanent partial disability, petitioner relies on the use of the phrase "in all other cases" in the preamble to Section 8(c)(21). Petitioner asserts that the phrase can refer only to cases involving permanent partial disability resulting from injuries other

than those listed in the preceding subsections on the schedule.

While petitioner's reading of the statutory language undoubtedly has surface appeal, it is not the only possible construction, particularly when Section 8(c)(21) is considered in the context of the entire Act. It is equally possible to read the phrase "in all other cases" to mean in all cases of permanent partial disability other than those in which an eligible claimant seeks to recover compensation under the schedule—*i.e.*, in all cases in which an employee able to show loss of earning capacity chooses to forego the award to which he would be entitled by virtue of his injury alone. Such a construction would, of course, be foreclosed were the Act to state that the scheduled benefits are exclusive, but the Act contains no such statement.

Moreover, as the court of appeals noted (App. 10a), the Benefits Review Board's construction is a "more rational * * * way of reading the statute." Because the statutory definition of "disability" (Section 2(10)) is explicitly linked to economic loss, because the awards available under the Act for permanent total disability, temporary total disability, and temporary partial disability all relate to actual diminished earning capacity, and because, as we discuss below, the central purpose of the Act is to compensate employees for loss of wage-earning capacity resulting from job-related injuries, it is more sensible to treat the schedule as a narrow exception to a compensation principle of general applicability rather than as an inflexible rule that encroaches on that principle even in cases in which the purposes for which the schedule was devised would not be served. As the court below observed (App. 11a; footnotes omitted):

> [U]nder the the permanent partial disability classification the scheduled injuries are by their very nature considered to be compensable regardless of their concrete impact on the employee's wage-earning capacity. As the Board wrote, "The schedule * * * contemplates an easily administered system of compensation, where a claimant need not prove a loss in wage-earning capacity. Rather, the loss in wage-earning capacity is presumed without reference to claimant's actual occupation." But there is another form that compensation for permanent partial disability may take—that contained in Section 8(c)(21). To establish an entitlement to compensation under this provision the claimant must prove that the injury has resulted in an actual diminution of earning capacity. Thus, although Cross's work-related injury is confined to his left knee—for which he is eligible for compensation under the scheduled benefits—the injury also renders his entire body, as a functioning economic unit, permanently partially disabled. Because he is capable of establishing the actual diminution in earning capacity required for compensation under Section 8(c)(21), he is brought within that part of the compensatory scheme.

Nothing in the legislative history of the Act suggests that the interpretation of Section 8(c)(21) held by the Director, the Benefits Review Board, and the court of appeals is incorrect. As even the dissenting judge below conceded (App. 22a), the legislative reports, hearings, and debates on the Act as passed in 1927 and as later amended "contain[] no clear answer to" the precise question in this case. Thus, congressional intent is best deduced by examining the essential purpose of the Act and determining which construction of Section 8(c) more closely harmonizes with that purpose and is less likely to produce incongruous results. In interpreting legislation, especially remedial legislation, it must be remembered that "words or phrases in a statute come 'freighted with the meaning imparted to them by the mischief to be remedied and by contem-

poraneous discussion. In such conditions history is a teacher that is not to be ignored.' " *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531, 545–546 (1978), quoting *Duparquet Co.* v. *Evans*, 297 U.S. 216, 221 (1936). Accord, *United Steelworkers of America, AFL-CIO-CLC* v. *Weber*, 443 U.S. 193, 201 (1979).

1. *The legislative history of the original Act*

When passed in 1927, the permanent partial disability section of the Act included, as it still does, both a schedule of awards for listed injuries and an "other cases" provision. Ch. 509, 44 Stat. 1427 *et seq.* As petitioner points out (Br. 11–12), a Senate version (S.3170) passed in 1926 had not included a schedule, providing instead (in Section 7(a)) that compensation for all types of disability, whether total or partial, be based on the compensation provision of the Federal Employees Compensation Act (FECA), ch. 458, Section 4, 39 Stat. 743, which awarded claimants a percentage of the difference in earning capacity measured before and after the injury. S. 3170, 69th Cong., 1st Sess., 67 Cong. Rec. 10614 (1926), reprinted in *To Provide Compensation for Employees Injured and Dependents of Employees Killed in Certain Maritime Employments (Part 2): Hearing on S. 3170 Before the House Comm. on the Judiciary*, 69th Cong., 1st Sess. 121–136 (1926) (hereinafter "1926 House Hearings (S. 3170)"). The Senate Report explained that a schedule had been included in the version of S. 3170 as originally introduced but was deleted by the committee in favor of the nonschedule FECA compensation formula. S. Rep. No. 973, 69th Cong., 1st Sess. 17 (1926). The committee observed that the commission to be charged with administering the Longshoremen's Act was already familiar with the formula as a result of its administration of FECA and that this would make for "greater certainty of findings and decisions" (*ibid.*). In a

brief debate on the bill, Senator Walsh observed that the schedule would have given longshoremen higher benefits than those enjoyed by similarly situated federal employees, a result he suggested was undesirable. 67 Cong. Rec. 10614 (1926).

Also in 1926, a bill on the same subject (H.R. 12063) was introduced in the House. 67 Cong. Rec. 9408 (1926). Although this bill included a schedule, the accompanying House Report gave no explanation for its inclusion, stating simply that the bill "follows in the main the New York State compensation law" that was "considered one of the best." H.R. Rep. No. 1190, 69th Cong., 1st Sess. 2 (1926). Hearings were held in both Houses. The witnesses at the hearings made references to the schedule contained in the New York law and the effect of adopting it instead of the FECA formula, but there was no discussion of why a schedule for permanent partial disability might or might not be preferable to a formula based solely on loss of wage-earning capacity, or whether a schedule, if adopted, should be the exclusive method of compensation as to the listed injuries. See generally, *Compensation for Employees in Certain Maritime Employments: Hearings on S. 3170 Before a Subcomm. of the Senate Comm. on the Judiciary*, 69th Cong., 1st Sess. (1926) (hereinafter "1926 Senate Hearings"); *To Provide Compensation for Employees Injured and Dependents of Employees Killed in Certain Maritime Employments (Part 1): Hearing on H.R. 9498 Before the House Comm. on the Judiciary*, 69th Cong., 1st Sess. (1926) (hereinafter "1926 House Hearings (H.R. 9498)"); 1926 House Hearings (S. 3170).[7]

[7] Because the federal legislation was patterned after a New York statute, petitioner relies on *Sokolowski* v. *Bank of America*, 184 N.E. 492 (N.Y. 1933), holding that schedule benefits are exclusive under New York law. But that case, decided in 1933, obviously can have no

When the Senate bill was sent to the House in 1927, it was "amended so as to make it conform substantially" to the House bill, including the insertion of a schedule. H.R. Rep. No. 1767, 69th Cong., 2d Sess. 20 (1927). The amended version passed the House following a brief debate that contained no reference to the schedule. 68 Cong. Rec. 5402–5414 (1927). When the final version was passed by the Senate, there was general discussion of the substantiality of the House changes (68 Cong. Rec. 5908 (1927) (remarks of Sen. Reed)) but again there was no reference to the inclusion of a schedule.[8]

bearing on Congress' intent in passing a statute six years earlier. See *Iacono* v. *Cardillo*, 208 F.2d 696, 699 (2d Cir. 1953). Indeed, petitioner cites nothing to show that "Congress was even aware of the [*Sokolowski*] decision, much less that it approved of that decision * * *." *Aaron* v. *SEC*, No. 79-66 (June 2, 1980), slip op. 19 n.18.

To the extent that state court decisions or other extraneous evidence provide any kind of guidance in interpreting the federal statute, they indicate that scheduled benefits should not be treated as exclusive. See, *e.g.*, *American Tank and Steel Corp.* v. *Thompson*, 90 N.M. 513, 515, 565 P.2d 1030, 1032 (1977); *Van Dorpel* v. *Haven-Busch Co.*, 350 Mich. 135, 85 N.W. 2d 97 (1957); *Republic Steel Corp.* v. *Kimbrell*, 370 So.2d 294 (Ala. Civ. App. 1979), writ denied, 370 So.2d 297 (Ala. 1979). According to the author of the leading treatise on the subject (2 A. Larson, *The Law of Workmen's Compensation* § 58.20, at 10–212 to 10–214 (1976)):

> Although it is difficult to speak in terms of a majority rule on this point, because of significant differences in statutory background, it can be said that at one time the doctrine of exclusiveness of schedule allowances did dominate the field. But in recent years there has developed such a strong trend in the opposite direction that one might now, with equal justification, say that the field is dominated by the view that schedule allowances should not be deemed exclusive, whether the issue is treatment of a smaller member as a percentage loss of a larger, or *treatment of any scheduled loss as a partial or total disability of the body as a whole*. [Emphasis added; footnotes omitted.]

[8] In the hearings on the bills that contained a schedule similar to that in the New York law, attention focused primarily on employer objections to the amount of the maximum limits on payments of weekly compensation. (New York then had a $20 weekly limit in addition to the limit represented by the restriction to two-thirds of average weekly wages; there was no such limit in either S. 3170 as introduced or H.R. 9498, although there were proposals to impose a $25 weekly limit.) See, *e.g.*, 1926 House Hearings (H.R. 9498) at 67 (statement of Henry C. Hunter), 90 (statement of O.G. Brown); 1926 Senate Hearings at 46–47 (statement of Cletus Keating), 60–61 (testimony of O.G. Brown). Mr. Brown explained that, under New York law, no payments could be made under the formula *after* scheduled benefits had been paid unless the employee could prove that he was then suffering permanent total disability. The witness did not comment on the question whether an employee suffering a scheduled injury could proceed under the "other cases" provision *as an alternative* to the scheduled benefit. 1926 Senate Hearings at 60. Frances Perkins, Chairman of the New York industrial board, advised the House Committee that she believed it was proper to allow "the full healing period [the period of temporary total disability] in addition to the schedule award and making the schedule losses an actual compensation for disability." She, too, made no comment on the "other cases" provision or the exclusiveness *vel non* of the schedule. 1926 House Hearings (H.R. 9498) at 22.

In the hearings on the bill that omitted a schedule for permanent partial disability benefits, there was only one objection to the absence of a schedule, and it was offered without explanation. 1926 House Hearings (S. 3170) at 215 (letter from the New York Towboat Exchange, Inc.). Discussion by both labor and employer representatives focused on weekly and monthly payment maximums. *Id.* at 139, 149, 205.

2. The legislative history of amendments to the Act

Although Section 8(c) has been amended since its initial passage, none of the amendments concerned the "other cases" provision or bears directly on the issue in this case. Hence, declarations by subsequent Congresses serve only to shed some light on the intent of Congress in enacting the statute in 1927. *Andrus* v. *Shell Oil Co.*, No. 78–1815 (June 2, 1980), slip op. 9 n.8. What little assistance the subsequent legislative history contributes to the analysis supports the Benefit Review Board's construction of Section 8(c)(21).

In 1938, Congress added Section 8(h) to the Act, defining loss of wage-earning capacity for the purposes of Sections 8(c)(21) and 8(e). Under this definition, the Deputy

Commissioner adjudicating a claim under either of those provisions could consider a number of specified factors, including "the effect of disability as it may naturally extend into the future." Act of June 25, 1938, ch. 685, Section 5, 52 Stat. 1165. The committee reports indicate that this provision was added out of concern for the plight of the worker suffering permanent partial injury who "returns to employment without apparent wage loss" (perhaps because his employer has paid his full wages for a time in order to defeat a wage-loss claim) but whose physical condition is such that he suffers "probable impairment of future wage-earning capacity." S. Rep. No. 1988, 75th Cong., 3d Sess. 6 (1938); H.R. Rep. No. 1945, 75th Cong., 3d Sess. 6 (1938). The amendment would, the committee reports suggested, avoid the spectacle of employees finding themselves eventually "cast adrift" and becoming and remaining "object[s] of charity." *Ibid.* Although, as the dissent below observed (App. 25a), the particular example given was an employee suffering a non-scheduled injury (an inoperable hernia), the rationale cannot logically be limited to those suffering non-scheduled injuries, given Congress' concern for the plight of employees suffering long-term uncompensated loss of wage-earning capacity. Instead, the amendment merely underscores and reiterates the intention of Congress to require that employees be compensated for disability in the economic sense.[9]

[9]The dissent below (App. 25a) also takes note of the 1938 committee reports' references to "wasteful litigation." But it is clear from the context that the committees were concerned not with litigation in cases not properly subject to Section 8(c)(21) but rather with litigation in proper cases over the question of what constituted a loss of wage-earning capacity. The committees believed that this problem arose simply from an "absence of clarity" in the Act about the meaning of "wage-earning capacity." S. Rep. No. 1988, *supra*, at 5; H.R. Rep. No. 1945, *supra*, at 5.

The 1972 amendments are no more helpful to petitioner. Petitioner relies heavily (Br. 14–23) on Congress' refusal in 1972 to adopt a proposed amendment to Section 8(c), suggesting that Congress thereby considered and rejected the notion of permitting awards such as the one received by respondent.[10] But the amendment in question did not concern employees' recovery of compensation under Section 8(c)(21) as an *alternative* to recovery of the scheduled award. It would, instead, have authorized *successive* awards, allowing a claimant to recover both the full scheduled benefit of two-thirds of his regular earnings for the specified number of weeks *and* two-thirds of his earnings loss thereafter. S. 2318, Section 7, 92d Cong., 2d Sess. (1972), reprinted in *Longshoremen's and Harbor Worker's Compensation Act Amendments of 1972: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 2d Sess. 7 (1972) (hereinafter "1972 Senate Hearings"); H.R. 12006, Section 7, 92d Cong., 1st Sess. (1971), and H.R. 15023, Section 7, 92d Cong., 2d Sess. (1972), reprinted in *Longshoremen's and Harbor Workers' Compensation Act: Hearings Before the Select Subcomm. on Labor of the House Comm. on Education and Labor*, 92d Cong., 2d Sess. 27, 38 (1972).

[10]Petitioner does not rely, nor could it reasonably do so, on the doctrine that the failure of Congress to amend a particular provision when it amends other parts of the same statute may be taken as acquiescence in a line of administrative or judicial authority construing that provision. See *United States* v. *Rutherford*, 442 U.S. 544, 554 n.10 (1979). There is no evidence that in 1972 Congress had its attention drawn to *Williams* v. *Donovan*, 234 F.Supp. 135 (E.D. La. 1964), aff'd, 367 F.2d 825 (5th Cir. 1966), cert. denied, 386 U.S. 977 (1967) (see page 27, *infra*), or any other decision bearing on the issue in this case. (See notes 16 & 20, *infra*.) Neither is there any evidence that decisions of the Benefits Review Board on this issue since 1975 (see page 28, *infra*) have been brought to the attention of Congress, which has made minor changes in the Act since that time. See, *e.g.*, Pub. L. No. 95-598, Title III, Section 324, 92 Stat. 2679.

The bills reported out by the House and Senate committees did not include the provision and gave no explanation for the deletion. S. Rep. No. 92-1125, 92d Cong., 2d Sess. (1972); H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. (1972).[11] Petitioner (Br. 17-22) cites certain comments made by witnesses at the hearings on the bills, but none of these witnesses expressed the view that under the Act as it then existed an employee suffering from a scheduled injury was precluded from recovering under Section 8(c)(21) as an *alternative* (rather than in addition) to the scheduled benefit.[12]

[11] As petitioner notes (Br. 13-14), Congress did enact provisions in the Federal Employees Compensation Act authorizing cumulative recoveries, *i.e.*, recovery of a scheduled award for permanent partial disability followed by payment for wage loss after the scheduled period. Act of Oct. 14, 1949, ch. 691, Section 104, 63 Stat. 855; Act of Sept. 6, 1966, Pub. L. No. 89-554, 80 Stat. 536. But Congress' decision to offer such *cumulative* benefits under FECA hardly suggests that it intended to prohibit *alternative* benefits under a separate statute. For the same reason, the dissenting judge in the court of appeals is in error in suggesting that respondent "effectively seeks to do under the Longshoremen's Act [what a claimant can do under FECA], namely, obtain the benefit of the scheduled payment supplemented by two-thirds of the difference in his lost earning capacity" (App. 29a).

[12] Although none of the witnesses at the committee hearings addressed the precise issue involved here, a number of witnesses did comment with respect to scheduled benefits in general. For example, one witness who opposed the proposal did so because he believed it unnecessary, on the theory that "[t]he present language of the Act is adequate to allow benefits to be continued under the general sections, if disability is in fact continuing." 1972 Senate Hearings at 445 (statement of Joseph M. Shelton). Other witnesses, including Ralph Hartman and Andre Maisonpierre (see Pet. Br. 17-19), suggested simply eliminating the schedule and basing compensation entirely on loss of wage-earning capacity. *Id.* at 183-185, 221, 240-241. Edward D. Vickery objected to the potential cost, stating: "If an employer is going to have to pay on the basis of a partial loss of wage-earning capacity, it ought to be done on that basis only, and the employer should not be required to pay *both* for a specific period of weeks and then for loss of wage-earning capacity on top of that." *Id.* at 332 (emphasis added). It would appear that in urging payment on the basis of "wage-earning capacity" alone, Vickery, like Hartman and Maisonpierre, was urging deletion of the schedule as an alternative to the proposed amendment.

3. *The teaching of the legislative history*

The legislative record, while ambiguous on the question presented in this case, leaves no doubt that the dominant purpose of Congress in enacting the statute was to compensate injured workers for their lost wages as a matter of "simple justice." H.R. Rep. No. 1767, 69th Cong., 2d Sess. 19-20 (1927); S. Rep. No. 973, 69th Cong., 1st Sess. 16 (1926). See also *Baltimore & Philadelphia Steamboat Co.* v. *Norton*, *supra*, 284 U.S. at 414. The aim of "putting an end to the costly and time-consuming actions for damages at common law," described by the dissenting judge below as "the overall goal" of statute (App. 23a), was merely incidental to this purpose. To be sure, the schedule does serve to provide workers with a speedy remedy and to allow them to avoid sometimes difficult problems of proof. As the Benefits Review Board observed (App. 42a-43a), the schedule offers "an easily administered system" of fixing the amount of payment due in many cases.[13]

But the goal of reasonably prompt and certain compensation for covered injuries is advanced by the Act even apart from the schedule,[14] and the schedule serves other purposes as well. Even if a scheduled injury does not reduce a worker's earning power, it is likely to impair sub-

[13] As we discuss below (see pages 26-30, *infra*), however, acceptance of petitioner's construction of Section 8(c)(21) would not necessarily minimize costly and time-consuming litigation.

[14] The delays of the pre-1927 litigation system were thought to be associated in large part with "the old common-law defenses which could be then interposed in cases for damage accruing from injuries sustained in industry." 68 Cong. Rec. 5414 (1927) (remarks of Rep. LaGuardia); see also 1926 House Hearings (S.3170) at 211 (statement of Edgar Wallace, American Federation of Labor). Those defenses were abolished as to all claims under the Act, not just those pursued under the schedule.

stantially the general quality of his life. Because, with exceptions not here relevant, the Act is an exclusive remedy for injuries that come within its terms (33 U.S.C. 905), the worker cannot sue his employer for damages. The schedule ensures that a worker who suffers a permanent physical impairment, such as loss of an arm or a leg, that does not totally disable him from working will not go entirely uncompensated.[15] "[I]n effect, the claimant is being compensated for loss of the body member, not lost earning capacity." *Gulf Stevedore Corp.* v. *Hollis*, *supra*, 298 F. Supp. at 431.[16]

[15]There is, however, no similar need for a schedule in the categories of disability other than permanent partial disability. In "total disability" cases, the worker who proves his claim necessarily will collect compensation under the economic loss test; and so long as the schedule exists for permanent partial disability, there is no need to provide one for temporary partial disability because the loss of a bodily member in itself warrants compensation under the permanent partial disability schedule.

[16]Thus, when Congress added a benefits schedule to the Federal Employees Compensation Act in 1949, the Senate Report explained (S. Rep. No. 836, 81st Cong., 1st Sess. 17 (1949)):

> The absence of a schedule * * * has presented two principal difficulties, the first of which is the extreme difficulty in determining fairly and objectively the precise extent to which a particular physical impairment diminishes the injured employee's wage-earning capacity. [Second, a] particular physical impairment to a member or function of the body does not always cause a proportional reduction in earning capaciity. * * * It is understandable that employees with such losses expect some form of indemnity for their loss.

As petitioner notes (Br. 30), two courts have decried this view as erroneously suggesting that the schedule simply puts "a 'price' on certain parts of the human body" and have explained it instead as establishing conclusive presumptions of the loss of wage-earning capacity produced by certain types of major impairments. *Iacone* v. *Cardillo*, 208 F.2d 696, 699 (2d Cir. 1953). *Rupert* v. *Todd Shipyards*, 239 F.2d 272, 275 (9th Cir. 1956). But neither of those cases concerned the issue presented here, and there is, in any event, no necessary conflict between the two theories. Congress provided the conclusive presumption for employees with certain types of permanent injuries who, for any reason, wish to avoid the necessity of proving actual loss of wage-earning capacity. It functions as both a substitute for such proof and compensation for the physical impairment.

These purposes may be fully served, however, without confining to the schedule every employee suffering one of the listed impairments, even when he can and is willing to prove that he sustained a loss of wage-earning capacity greater than the scheduled benefit. As the court of appeals remarked, "[p]ermanent partial disability, no less than total disability, is an economic concept whose meaning in any single case is tied inextricably to the claimant's wage-earning capabilities. Where the scheduled benefits fail adequately to compensate for a diminution in those capabilities, Section 8(c)(21) is the remedial alternative" (Pet. App. 12a; footnote omitted). It would be an odd construction of a remedial statute indeed to seize upon provisions of the Act intended to provide injured claimants with a speedy and certain remedy as a reason for denying them the opportunity to obtain a more beneficial remedy offered by the statute.

In sum, petitioner's construction of Section 8(c) would undermine the fundamental goal of Congress in enacting the Act—compensating injured workers for their loss of wage-earning capacity. As we explain below, only the construction of the statute employed by the Benefits Review Board and upheld by the court of appeals serves that purpose and avoids inequities that Congress should not be presumed to have intended. See *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 543-544 (1940).

C. A Construction of Section 8(c) That Treats Scheduled Awards as Exclusive Produces Incongruous Results that Congress Cannot Reasonably Have Intended

The result of the construction of Section 8(c) of the Act urged by petitioner is that claimants suffering severe dis-

ability as a result of any one of the major impairments listed in the schedule may be granted only a tiny fraction of the amount representing their loss in wage-earning capacity, even though compensation for such losses is the main purpose of the Act. The present case illustrates the point well. Respondent's economic loss has been found to equal approximately $130 a week, and his recovery under Section 8(c)(21) is two-thirds of that amount, or $86 a week (App. 49a). If respondent is confined to the scheduled award for partial loss of the use of his leg, he will, according to petitioner's own calculations (Br. 8–9), receive less than 10% of his present award and only about 6% of his economic loss. Had respondent's disability been produced by a nonscheduled injury, he would indisputably be entitled to two-thirds of his actual wage loss. It is most unlikely that Congress would have intended to effectuate the central goal of compensation in the case of workers who suffer nonscheduled impairments—*i.e.*, impairments not sufficiently common or important to be listed in the schedule—but not in the case of workers suffering scheduled impairments.

Petitioner's construction also leads to irrational results in the treatment of temporary partial disability. There is no schedule of benefits for this category of disability. Under Section 8(e), 33 U.S.C. 908(e), an employee suffering such disability recovers two-thirds of his loss of wage-earning capacity for as long as the disability endures, up to a limit of five years. A large loss of wage-earning capacity judged to be temporary, but continuing for close to five years, might well entitle a victim to benefits far exceeding the appropriate scheduled award for permanent partial disability. This is so even though scheduled awards are based on two-thirds of average earnings rather than two-thirds of lost wage-earning capacity, because many of the scheduled awards provide such compensation for a

substantially shorter period than the 260 weeks comprising five years.

Again, the present case provides a striking illustration. If respondent is confined to the schedule, he may recover at most only about $12,800 and perhaps as little as $3200 for his permanent disability, depending on how the trier of fact resolves the conflict in the medical testimony regarding the degree to which his leg is impaired (see Pet. Br. 8; App. 46a). If, however, respondent's disability were deemed merely temporary, he could recover more than twice the maximum scheduled amount, or some $22,400.[17] Congress can hardly have intended to provide adequate compensation for those whose partial disability is temporary and to deny it to those, like respondent, for whom such disability is permanent.

A third anomaly exists with respect to cases in which a scheduled injury produces physical effects that extend beyond the loss of a listed body member. Petitioner, arguing (Br. 4, 7, 29) that the schedule should apply in this case because respondent's injury was confined entirely to his leg, implicitly concedes that where the effect of a scheduled injury extends to another part of the body, the employee may escape the schedule and prove the extent of his disability.[18] Yet compensating a claimant for such

[17] The sum ($86 per week) found by the administrative law judge to represent respondent's loss of wage-earning capacity (App. 49a) would amount to $22,400 if paid weekly for five years.

[18] This point is well established in the general law of workers' compensation. Although there are no judicial decisions on the point under the Longshoremen's Act, the "great majority of modern decisions" under similar state statutes, as Professor Larson explains, hold that the schedule allowances are not exclusive where the injury has a physical effect on the remainder of the body. 2 A. Larson, *supra*, § 58.20, at 10–197. Professor Larson is of the view that the same result should apply where, although the physical effects are localized, the economic effects of the injury extend to the body as a whole. *Id.* at 10–219.

broader effects of a scheduled injury is as inconsistent with the principle of exclusivity of scheduled awards as is compensating a claimant for broader effects in the form of damage to his body "as a functioning economic unit" (App. 11a).

Finally, petitioner's construction of Section 8(c)(21) would result in irrationally disparate treatment between employees judged as totally disabled and those who can establish high degrees of partial disability. Under Section 8(a) of the Act, a person with a permanent total disability, whether the disability is produced by a scheduled injury or not, is entitled to receive two-thirds of his previous average weekly wages indefinitely. A person who is confined to a scheduled award, however, may recover two-thirds of his wages for only a limited period—in no case more than six years and in many instances less than one year. 33 U.S.C. 908(c)(1)–(20). Thus, under petitioner's construction of the Act, a claimant suffering an 80% to 90% disability (*i.e.*, a near-total decline in wage-earning capacity) would almost surely be limited to a minute fraction of the compensation received by a claimant with the same injury who is deemed totally disabled. This difference is particularly unjust because the employee deemed only partially disabled is one who is making an effort to continue in some form of employment, even if he is unable to perform work that pays as well as work he could do prior to his injury. See *Mason* v. *Old Dominion Stevedoring Corp.*, 1 B.R.B.S. 357, 365 (1975); *Brandt* v. *Avondale Shipyards, Inc.*, 8 B.R.B.S. 698, 701–702 (1978). Moreover, as we discuss below, the existence of this disparity in treatment is at least as likely to increase litigation of claims under the Act as the principle of schedule exclusivity is to reduce it.

D. Petitioner's Construction of Section 8(c) Would Not Necessarily Minimize Litigation Under the Act

Petitioner suggests (Br. 14, 30–31) that its construction of Section 8(c) of the Act reflects Congress' deliberate intent to minimize "case-by-case" adjudication even at the expense of grossly undercompensating some employees for disability produced by industrial injuries.[19] As we have already noted (page 21, *supra*), the Congress that enacted the Act and subsequent Congresses that amended it *have* been concerned with administrative convenience—with assuring that, wherever possible, claims may be settled promptly—but the dominant purpose of the Act is to provide adequate compensation to injured workers. The construction of Section 8(c) urged by petitioner undermines that purpose, and it does not necessarily ensure that there will be decreased litigation of claims under the Act.

As the paucity of reported decisions indicates, litigation of the issue presented in this case has been rare. The only decision directly on point, aside from that of the court below, is *Williams* v. *Donovan*, 234 F. Supp. (E.D. La. 1964), aff'd, 367 F.2d 825 (5th Cir. 1966), cert. denied, 386 U.S. 977 (1967), holding that the schedule is exclusive for

[19] Claims brought under Section 8(c)(21) generally are not as simply resolved as claims brought under the schedule (although, as explained below, claims for partial loss of use of a body member may generate complex litigation). When an employee seeks to recover under Section 8(c)(21) and the parties cannot agree on the extent of loss of wage-earning capacity, an administrative law judge must determine the employee's economic loss by comparing his average pre-injury earnings with his post-injury wage-earning capacity. The latter may be measured by actual earnings, but if there are no earnings or the earnings do not fairly represent post-injury wage-earning capacity, the judge may fix a figure based on certain specified factors. 33 U.S.C. 908(h). Payments for permanent partial disability continue for as long as the disability exists, but the case may be reopened for redetermination of the amount awarded when changed conditions produce a change in wage-earning capacity. 33 U.S.C. 922.

listed injuries that cause permanent partial disability. It would appear that in the great majority of cases, claimants have preferred to proceed under the schedule, either because they valued an award of quick and certain benefits or because, unlike respondent, they lacked clear proof of a significant loss of wage-earning capacity.[20]

In the years since 1975, when the Benefits Review Board expressly declined to follow the Fifth Circuit's decision in *Williams* v. *Donovan*, *supra*, and upheld an award of permanent partial disability under Section 8(c)(21) to an employee who had suffered a scheduled injury, there appear to have been only ~~four~~ five cases, including this one, in which the issue has been litigated before the Board. *Mason* v. *Old Dominion Stevedoring Corp.*, *supra*; *Richardson* v. *Perna & Cantrell, Inc.*, 6 B.R.B.S. 588 (1977); *Brandt* v. *Avondale Shipyards, Inc.*, 8 B.R.B.S. 698 (1978); *Collins* v. *Todd Shipyards Corp.*, 9 B.R.B.S. 1015 (1979). This is persuasive evidence that few employees eligible for scheduled awards instead seek to recover for their actual economic losses under Section 8(c)(21).

But even if a larger number of employees eligible for scheduled awards were to seek compensation under Section 8(c)(21), it is not clear that there would be a net increase in litigation. If petitioner's view prevails, there will be a strong incentive for employees with scheduled injuries who face substantial income losses over the years to

[20] Employees suffering a scheduled injury under the Act are entitled to an award even in the absence of proof of actual disability. See, *e.g.*, *Bethlehem Steel Co.* v. *Cardillo*, 229 F.2d 735 (2d Cir. 1956); *Travelers Insurance Co.* v. *Cardillo*, 225 F.2d 137, 143-144 (2d Cir.), cert. denied, 350 U.S. 913 (1955); *Gulf Stevedore Corp.* v. *Hollis*, 298 F. Supp. 426 (S.D. Tex. 1969), aff'd per curiam (opinion adopted), 427 F.2d 160 (5th Cir.), cert. denied, 400 U.S. 831 (1970). In such cases, the award serves to compensate the injured employee for the permanent loss (or loss of use) of a body member. See note 16, *supra*.

attempt to prove either that the effects of the injury have spread to other parts of the body or that they are totally disabled. Litigation over the technical medical issues involved in proving diffused physical effects can be expected to be complex and lengthy in many cases. Litigation of total disability claims also can be time-consuming, because an employee need not be totally bedridden to prove his claim under Section 8(a) of the Act. See *American Stevedores, Inc.* v. *Salzano*, 538 F.2d 933, 935-936 (2d Cir. 1976); *Watson* v. *Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968), cert. denied, 394 U.S. 976 (1969).[21] It is not consonant with any purpose reasonably attributable to Congress to provide an incentive for such litigation or to encourage false claims by malingerers, while denying adequate compensation to those (such as respondent) who unquestionably have suffered a serious loss of wage-earning capacity but are nonetheless making the effort to continue working.

Finally, even in cases in which the claim is determined solely by reference to the schedule, litigation is not necessarily avoided. In cases like the present one, involving partial loss of use of a member, the finder of fact is required by Section 8(c)(19) to determine the proportion of loss of use, so that the schedule award may be adjusted accordingly. Here, for example, if the case is remanded for a calculation of the award according to the schedule, it will be necessary to resolve the dispute between the expert witnesses concerning the extent of impairment to respondent's leg (see App. 7a, 46a-47a). By contrast, the

[21] Resolution of total disability claims involves such factors as the "claimant's age, education, industrial history, and the availability of employment a claimant can perform considering his physical condition." *Dugger* v. *Jacksonville Shipyards*, 8 B.R.B.S. 552, 555 (1978), aff'd, 587 F.2d 197 (5th Cir. 1979). See also *American Mutual Insurance Co. of Boston* v. *Jones*, 426 F.2d 1263 (D.C. Cir. 1970).

test under Section 8(c)(21) and Section 8(h) for loss of wage-earning capacity in cases such as this merely involves a calculation of pre- and post-injury earnings and is relatively easy to apply.

In sum, in sustaining respondent's award of compensation for permanent partial disability under Section 8(c)(21) of the Act, the court of appeals adopted a reading of the statutory language that most fully effectuates the congressional purpose, that represents the view of those charged with administering the statute, and that avoids "incongruous or harsh results" (*Baltimore & Philadelphia Steamboat Co.* v. *Norton*, 284 U.S. 408, 414 (1932)). Because "workmen's compensation laws are to be liberally construed in furtherance of the purpose for which they were enacted" (*Industrial Commission* v. *McCartin*, 330 U.S. 622, 628 (1947)), the court below correctly construed the Act to allow respondent to obtain an award that accurately compensates him for the economic loss resulting from his job-related injury.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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